BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL G. DAVISON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,041,491
SARA LEE CORPORATION	)	
Respondent	)	
AND	)	
	)	
INDEMNITY INSURANCE COMPANY	)	
OF NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the February 24, 2010 Award entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Workers Compensation Board heard oral argument on May 21, 2010.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for claimant. Douglas C. Hobbs of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a series of repetitive injuries. In the February 24, 2010 Award, ALJ Barnes found claimant sustained his burden of proof that he suffered personal injury by accident arising out of and in the course of his employment in a series of accidental injuries culminating on July 19, 2008. The ALJ concluded: (1) claimant did not establish he is permanently and totally disabled, (2) claimant sustained a whole person injury rather than the two scheduled injuries argued by respondent and (3) claimant was entitled to an

81 percent work disability,[1] based upon an averaged 62 percent task loss and a 100 percent wage loss. ALJ Barnes awarded claimant permanent partial disability benefits based upon the 81 percent work disability.

Respondent contends the ALJ erred. Respondent argues claimant failed to prove he sustained accidental injury arising out of and in the course of his employment. As to the issue of the nature and extent of claimant's disability, respondent argues: (1) claimant is not permanently and totally disabled, (2) claimant is not entitled to an award based on a work disability as he, at most, has suffered two scheduled injuries and (3) claimant did not sustain permanent injury while working for the respondent and should not receive compensation for any permanent functional impairment. Respondent requests the Board vacate the Award and deny claimant compensation as he has failed to prove he suffered a compensable work-related injury.

Claimant contends he has proven he was injured as a result of his work activities for the respondent. Claimant argues he is permanently and totally disabled. In the alternative, claimant asserts he is entitled to receive benefits for a 90 percent work disability, based upon an 80 percent task loss as opined by Dr. Pedro A. Murati and a 100 percent wage loss.

The issues before the Board on this appeal are:

- Did claimant suffer accidental injury arising out of and in the course of his employment?

- What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant worked as an oven operator for the respondent. Claimant's duties as an oven operator included pulling racks off a cooler and loading them onto a conveyor belt, followed by putting the racks into the oven. According to the claimant, the trays of buns and bread weighed between 8 and 15 pounds.[2] Claimant would lift around 3,000 trays

[1] A permanent partial general disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

[2] R.H. Trans. at 9, 10.

minimum each shift.[3] Claimant testified that in July 2008 his right hand and fingers started swelling.[4] He also testified he experienced back problems from doing his work.

On July 19, 2008, claimant started experiencing shooting pain up his right arm into his shoulder.[5] Claimant's bosses thought he possibly was having a stroke so they took him to the emergency room.[6] When claimant presented at the emergency room he did not mention pain in his neck or back.[7] He was diagnosed with arthritis in his right arm. Claimant testified that the emergency room physician advised him that the arthritis was caused by repetitive movement. Claimant testified he reported this to his supervisor.[8] It appears claimant was referred by the emergency room physician to his family physician.

Claimant worked at Sara Lee for 3 days following his visit to the emergency room. His last day with Sara Lee was around the end of July or the beginning of August 2008. When he last testified at the October 2009 regular hearing, he was unemployed.

Claimant describes constant pain in his hands and neck and periodic pain in his shoulders and up his arms.[9] When claimant returned to work as an oven operator for 3 days following his visit to the emergency room he tried to perform his job with his left hand, which caused problems in that hand.[10]

Claimant initially treated his injuries with his family physician, Dr. Joe D. Davison.[11] On July 22, 2008, claimant presented to Dr. Davison with hurting hands. The doctor diagnosed claimant with acute arthritis and tendinopathy and provided conservative treatment. At a follow-up visit on August 8, 2008, Dr. Davison took claimant off work for 2 weeks. The record indicates he again took claimant off work on August 21, 2008. The doctor's August 21, 2008 office notes reflect claimant was having SI joint problems. Those

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[3] P.H. Trans. (Oct. 16, 2008) at 8.

[4] *Id.*, at 10.

[5] *Id.*

[6] *Id.*

[7] R.H. Trans. at 17.

[8] P.H. Trans. (Oct. 16, 2008) at 11.

[9] R.H. Trans. at 12.

[10] P.H. Trans. (Oct. 16, 2008) at 13.

[11] Claimant and Dr. Davison are not related.

office notes indicate Dr. Davison referred claimant to Dr. Pedro A. Murati for a second opinion.[12]

Dr. Davison saw claimant on August 14, 2007, for injuries he sustained in an automobile accident. At the time, claimant complained of difficulty in his cervical area. Dr. Davison diagnosed claimant with a whiplash injury and prescribed pain medication. Claimant saw Dr. Davison one additional time for the complaints to his cervical area. During that second visit, which was on August 21, 2007, claimant reported some improvement but he was still experiencing problems. At that visit the doctor prescribed another pain medication. Claimant did not return for any additional treatment for the injuries related to the automobile accident.

Respondent referred claimant to Dr. Ronald Davis. Dr. Davis examined claimant on August 14, 2008. Dr. Davis diagnosed claimant with arthritis of the hands with pain and tenderness. Dr. Davis opined that claimant's condition was symptomatic at work but was neither caused nor aggravated by his work.

Dr. Murati first examined claimant on September 15, 2008, and subsequently was appointed as an authorized treating physician. He diagnosed claimant as suffering from bilateral carpal tunnel syndrome, myofascial pain and low back pain secondary to radiculopathy. Dr. Murati ordered physical therapy and he conducted EMG/nerve conduction studies. According to Dr. Murati, the testing revealed findings consistent with bilateral carpal and ulnar cubital tunnel syndrome in claimant's upper extremities and lumbosacral radiculopathy from claimant's lower back. Lumbar and cervical spine MRIs were also performed on claimant. The lumbar spine MRI was unremarkable and the cervical spine MRI revealed degenerative disc disease. On April 28, 2009, Dr. Murati rated claimant's whole person functional impairment at 28 percent. The rating was based on 10 percent to each upper extremity for the carpal tunnel syndrome, which converts to a 6 percent whole person rating for each upper extremity; 5 percent whole person impairment for myofascial pain syndrome affecting the cervical paraspinals; 5 percent whole person impairment for myofascial pain syndrome affecting the thoracic paraspinals; and 10 percent whole person impairment for the low back pain secondary to lumbar radiculopathy.[13] He also provided claimant with permanent restrictions. Dr. Murati reviewed claimant's past work tasks as compiled by vocational rehabilitation consultant Doug Lindahl and indicated claimant had an 80 percent task loss.

[12] The record also indicates claimant's attorney referred claimant to Dr. Murati.

[13] Murati Depo. at 9, 10 and Ex. 2.

At the request of the respondent's attorney, Dr. Paul S. Stein examined and evaluated the claimant on July 30, 2009. Dr. Stein diagnosed degenerative osteoarthritic changes in claimant's hands, which he felt were probably aggravated by intensively repetitive work activity with the hands. Dr. Stein concluded there was no evidence of impairment of function to the lumbar or cervical spine. Dr. Stein rated claimant with an 8 percent functional impairment to the right upper extremity at the level of the hand and a 4 percent functional impairment to the left upper extremity at the level of the hand. After reviewing a list of claimant's past work tasks compiled by vocational rehabilitation consultant Steve Benjamin, Dr. Stein indicated claimant had a 43.75 percent task loss. Dr. Stein recommended that claimant permanently avoid frequent repetitive activity with either hand. Additionally, he recommended claimant avoid anything other than minimal use of vibrating or impacting power tools.

At the request of the respondent's attorney, Steve Benjamin, a vocational rehabilitation consultant, performed a vocational assessment of claimant. He opined that considering the permanent work restrictions of both Dr. Stein and Dr. Murati claimant could re-enter the open labor market and earn approximately $397.40 a week.

At the request of claimant's attorney, Doug Lindahl, a vocational rehabilitation consultant, performed a vocational assessment of the claimant. In his May 24, 2009 letter to claimant's attorney, he opined, considering the permanent work restrictions of Dr. Murati, that claimant could not compete in the open labor market. However, assuming certain conditions, Mr. Lindahl subsequently testified that claimant could physically perform several jobs; namely, a Walmart greeter or a security guard.[14]

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[15] A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."[16] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[17] The existence, nature and extent of the disability of an injured workman is a question of fact.[18] A workers

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[14] Lindahl Depo. at 15.

[15] K.S.A. 2008 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[16] K.S.A. 2008 Supp. 44-501(a).

[17] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[18] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.[19] The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.[20]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[21] Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.[22]

The respondent argues that four physicians provided opinions in this case and only one, Dr. Murati, found claimant suffered an accidental injury arising out of and in the course of his employment with respondent. The evidence does not support the respondent's argument. Dr. Davison's records indicate claimant's bilateral hand condition was related to his work at the respondent.[23] Additionally, Dr. Stein opined that claimant's degenerative osteoarthritic changes in his hands were probably aggravated by repetitive work activity. The claimant has sustained his burden of proving he suffered accidental injury arising out of and in the course of his employment with respondent.

The respondent lists notice as an issue in the instant case. However, the parties agreed at oral argument that notice was not an issue. The Board will not disturb the ALJ's conclusion that claimant provided timely notice to the respondent.

Claimant requests a determination that he is permanently and totally disabled or, in the alternative, that he is entitled to work disability. Claimant argues he is permanently and totally disabled because he has injuries to both upper extremities and there is a presumption that he is permanently and totally disabled under K.S.A. 44-510c(a)(2), which states:

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[19] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[20] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[21] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[22] *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[23] Joe Davison Depo., Ex. 2, July 22, 2008 office note.

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the statute creates a presumption it also states by including the language, "in the absence of proof to the contrary," that the presumption can be rebutted.

The Board determines that the presumption has been rebutted. First, neither Dr. Murati nor Dr. Stein opined claimant was permanently and totally disabled. Second, Mr. Lindahl, the only expert who indicated that claimant was permanently and totally disabled, agreed in his testimony that, assuming certain conditions, claimant could perform some jobs, such as a Walmart greeter or a security guard.[24] Claimant has failed to satisfy his burden of proof that he is incapable of engaging in any substantial and gainful employment and consequently that he is permanently and totally disabled.

Respondent contends that the claimant is not entitled to work disability and at the most sustained two scheduled injuries. The Board disagrees.

Dr. Stein opined claimant only had scheduled injuries to his upper extremities. He acknowledged cervical degenerative disc disease, loss of range of motion, a mechanism of injury and complaints of pain and the existence of spasms related to claimant's neck, taken together, might qualify for an impairment.[25] Additionally, respondent argues claimant provided erroneous and misleading information to all the medical experts in this matter, which diminishes his credibility. Claimant did fail to disclose to Dr. Stein the circumstances of the 2007 motor vehicle accident.

It is less clear whether claimant disclosed the motor vehicle accident to Dr. Murati. Dr. Murati's September 15, 2008 report indicates claimant denied any previous significant injuries to his hands, arms, shoulders, neck or low back prior to the work accident. Claimant indicated he did not consider the 2007 motor vehicle accident significant.[26] In

[24] Lindahl Depo. at 15.

[25] Stein Depo. at 37.

[26] R.H. Trans. at 22.

fact, the claimant only saw his family physician twice for his injuries.[27] On the second visit, his condition had improved some and he did not return for any additional treatment for the injuries related to the automobile accident. Claimant suffered a cervical whiplash injury secondary to motor vehicle accident as a result of the 2007 motor vehicle accident.

While the failure to disclose the motor vehicle accident and related injuries to Dr. Stein and other inconsistencies in the record diminish claimant's credibility it does not rise to the level to discount all of claimant's testimony nor the medical opinions of Dr. Murati.

Dr. Murati, the authorized treating physician, conducted EMG/nerve conduction studies of claimant's lower back and lower extremities and discovered radiculopathy from his lower back. Claimant testified he experienced back pain while performing his job for respondent. Ultimately, Dr. Murati rated claimant with a 28 percent whole body impairment. In addition, Dr. Stein indicated certain conditions, taken together, might qualify for an impairment with regard to claimant's neck. The Board adopts Dr. Murati's 28 percent whole body functional impairment rating.

For the reasons discussed above, the Board determines claimant is entitled to a general body disability based upon work disability.

Work disability is determined by averaging the task loss with the wage loss.[28]

The Board adopts the ALJ's 81 percent work disability determination. The task loss opinions of Dr. Murati and Dr. Stein are averaged to arrive at a 62 percent task loss. Claimant is entitled to a 100 percent wage loss. Averaging the two losses together, the claimant is entitled to an 81 percent work disability.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[29] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

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[27] Joe Davison Depo., Ex. 2.

[28] K.S.A. 44-510e(a).

[29] K.S.A. 2009 Supp. 44-555c(k).

AWARD

WHEREFORE, the Board hereby affirms the February 24, 2010 Award of the ALJ in its entirety.

IT IS SO ORDERED.

Dated this ____ day of June, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge